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In The

Supreme Court of the United States

October Term, 1966

No. 484

ALLSTATE INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioners,

v.

EDWIN S. LANIER, Commissioner of Insurance for the State of North Carolina; T. WADE BRUTON, Attorney General for the State of North Carolina, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR EDWIN S. LANIER, COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA, and T. WADE BRUTON, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA, IN OPPOSITION.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-6a) is reported at 361 F. 2d 870. The opinion and order of the District Court (Pet. App. 5a-36a)[1] are reported at 242 F. Supp. 73.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1966 (Pet. 7a). The petition for writ of certiorari was filed on August 25, 1966. The jurisdiction of this Court

is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Should this Court consider whether the Court of Appeals erred in holding that the Sherman Anti-Trust Act is not applicable to an affirmative program of insurance regulation established and actively supervised by a state?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution, commonly known as the Supremacy Clause; relevant provisions of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1-7), commonly known as the Sherman Anti-Trust Act; the Act of March 9, 1945, 59 Stat. 33, as amended (15 U.S.C. 1011-1015), commonly known as the McCarran-Ferguson Act or Public Law 15; Article III, Section 1, of the North Carolina Constitution; General Statutes of North Carolina (Sections 58-5, 58-9.3, 58-246 through 58-248.8); and Chapter 1006, 1961 Session Laws of North Carolina, are set out in Resp. App. 1b-12b, 15b-16b.[2]

STATEMENT

The Legislature of North Carolina has adopted a comprehensive statutory scheme for the regulation of the business of automobile liability insurance in North Carolina. As part of this regulatory legislation, North Carolina requires all automobile liability insurers licensed to do business in North Carolina to belong to a statutory rating bureau, which proposes insurance rates and coverage standards, subject to the supervision, review and approval of the Commissioner of Insurance, an elected official of the State. All companies

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[1] "Pet. App." refers to the printed appendix filed by Petitioners in the Court of Appeals.

[2] "Resp. App." refers to the printed appendix filed by Respondents in the Court of Appeals.

which sell automobile liability insurance in North Carolina are required to adhere to the rates approved by the Commissioner, unless they have obtained his prior approval to "deviate" upward, i.e., to charge a higher rate in an individual case. Downward deviations are prohibited by statute[3], but insurers are permitted to offer policies with dividend return features. The North Carolina law provides penalties, including fines and license revocation to secure compliance with its regulatory scheme.

Petitioners contend that this regulatory scheme is inconsistent with the Sherman Anti-Trust Act (15 U.S.C. 1-7) and the McCarran-Ferguson Act (15 U.S.C. 1011-1015), and particularly with Section 3(b) of the latter Act, which provides, in pertinent part:

> "Nothing contained in this chapter [the McCarran-Ferguson Act] shall render the . . . Sherman [Anti-Trust] Act inapplicable to any agreement to boycott, coerce or intimidate or act of boycott, coercion or intimidation."

Respondents have contended that the statutory insurance regulations of North Carolina, and specifically its statutory rating bureau, amount to "state action" and not to "private action" which is the only subject of the Sherman Anti-Trust Act, as this Court has held in *Parker v. Brown*, 317 U.S. 341 (1943) and reiterated in *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). As the

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[3] See 1961 Session Laws of North Carolina, Chapter 1006 (Resp. App. 15b-16b). The prohibition of downward deviations was accompanied in the same Act by affirmative legislation establishing a Safe Driver Reward Plan which provides for a distinction in promulgated insurance rates "between classes of drivers having safe driving records and those having a record of chargeable accidents, convictions of major traffic violations and/or a series of minor traffic violations". Under the Plan promulgated by the Commissioner of Insurance pursuant to Chapter 1006 (Resp. App. 16b-24b), all persons with a three-year history of no chargeable accidents or traffic violations receive a credit of 10% of the basic rate for their classification.

Court of Appeals noted (Pet. 3a), Petitioners have not attacked the findings and conclusions of the District Court that North Carolina's statutory regulations constituted "state action" (Pet. App. 13a-18a, 31a-35a).

It is Respondent's position that there is nothing in the McCarran-Ferguson Act, and particularly nothing in Section 3(b) quoted above, which suggests any intention on the part of Congress to either expand the ambit of the Sherman Anti-Trust Act or to overrule *Parker v. Brown, supra.*

Both the District Court and the Court of Appeals for the Fourth Circuit, in a unanimous opinion, have agreed and rejected Petitioners' contentions.

ARGUMENT

I. The decisions of the District Court and the Court of Appeals add nothing new to the fabric of State insurance regulation.

The type of regulation employed by North Carolina in the field of automobile liability insurance has been in use for more than thirty years,[4] before the decision in *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944) and before the enactment of the McCarran-Ferguson Act, and it has always been considered as an acceptable means of insurance regulation. In fact, its use seems to have been encouraged by the *South-Eastern Underwriters* decision,[5] a study and analysis of which led North Carolina to

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[4] North Carolina has had a statutory bureau and uniform rates in Workmen's Compensation insurance since 1931. (Resp. App. 24b-27b)

[5] "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance, we regard as exaggerated. Few states go so far as to permit private insurance companies without state supervision to agree upon and fix insurance rates. cf. *Parker v. Brown,* 317 U.S. 341, 350-352. No states authorize combinations of insurance companies to coerce, intimidate and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices." (footnote omitted) 322 U.S. at 562.

adopt its present form of automobile liability insurance regulation.[6] Several other states, and the District of Columbia, also utilize either mandatory bureaus or uniform rates, or both, for one or more lines of insurance.[7]

II. Petitioners' argument that the McCarran-Ferguson Act overruled the decision in Parker v. Brown with respect to the business of insurance has no support in the language of that statute or in its legislative history.

The essence of the Petitioners' claim is that when Congress passed the McCarran-Ferguson Act, in 1945, with the purpose "broadly to give support to existing and future systems for regulating and taxing the business of insurance",[8] it changed the scope of the Sherman Anti-Trust Act, if only with reference to the insurance business, so as to overrule the interpretation of the Sherman Anti-Trust Act which this Court announced in *Standard Oil Company v. United States*, 221 U.S. 1 (1911) and more fully developed in *Parker v. Brown, supra*, and thus prevent precisely the kind of state regulation which this Court sustained in *Parker v. Brown, supra*.[9]

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[6] See Wettach, *The 1945 Revision of the Insurance Laws of North Carolina*, 23 N.C.L.REV. 283 (1945), (Resp. App. 27b-58b)

[7] See Resp. App. 12b-15b. The District of Columbia has required mandatory bureau membership for fire insurance since 1944. (D.C. Code §35-1404)

[8] *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, 429 (1946).

[9] While Petitioners twice make the contention (Pet. 6, 18) that *Parker v. Brown* decided only that a State cannot *violate* the Sherman Anti-Trust Act and not whether the Sherman Anti-Trust Act preempts State action, the decision cannot be so limited. In *Parker v. Brown*, this Court had before it an injunction (issued by the District Court) which barred enforcement of the State's prorate statute as contrary to the Sherman Anti-Trust Act and the Commerce Clause (317 U.S., at 348); this Court overturned the injunction. Chief Justice Stone specifically discussed the "preemption" doctrine, 317 U.S., at 350, before going on to find that there was no conflict between the California statute and the Sherman Anti-Trust

This contention finds no support in the language of the McCarran-Ferguson Act which is in itself a sufficient repudiation of any such purpose.[10]

Neither do Petitioners' contentions find support in the legislative history of the Act. Contrary to Petitioners' view (Pet. 6, n. 2), the Court of Appeals did not ignore the legislative history of the McCarran-Ferguson Act; in fact, after extensive argument in briefs and orally, it required both sides to submit copies of the entire legislative history for its use. On the basis of its examination of the legislative history, the Court unanimously found (Pet. 4a) "nothing in the 1945 McCarran-Ferguson Act or its legislative history to suggest a limitation on the principle of *Parker v. Brown.*"

What the legislative history of the McCarran-Ferguson Act shows is an intention by Congress to preserve to states broad freedom in the regulation and taxation of insurance, and thereby set at rest the fears generated by the decision of the Court in *United States v. South-Eastern Underwriters Association, supra,* while preserving federal jurisdiction to prevent the abuses alleged in the *South-Eastern Under-*

Act, because the Sherman Anti-Trust Act does not purport to regulate acts of a state. Contrary to Petitioners' view (Pet. 6), the Court of Appeals did not ignore Petitioners' distinction; it rejected it, with an extensive quote of the language from *Parker v. Brown* (Pet. 3a, 4a).

[10] Petitioners contend (Pet. 9-10) that the construction of Section 3(b) of the McCarran-Ferguson Act approved by the Court of Appeals rendered that section "completely meaningless and redundant to Section 2(b)". In fact, there is no such redundancy. Section 3(b) made the Sherman Anti-Trust Act applicable to *private* boycott, intimidation and coercion even during the moratorium provided in Section 3(a) when the federal anti-trust laws were otherwise in abeyance. After the moratorium ended, it remains effective as a limitation upon the proviso to Section 2(b) in that it prevents the states from adopting regulations which would permit and immunize *private* boycott, coercion and intimidation from prosecution under the federal anti-trust laws. Absent Section 3(b), the states by enacting regulatory statutes could have ousted federal jurisdiction over such *private* conduct, a danger clearly recognized by the Congress. See 91 Cong. Rec. 1486-1487. (Emphasis added.)

writers Case, namely *private* acts of coercion, boycott and intimidation, which the states had been unable or did not choose to prevent.[11]

As the Court of Appeals found (Pet. 5a), Congress recognized the continuing validity of *Parker v. Brown*.[12] What concerned it was that *Parker v. Brown* limited the options as to forms of regulation which were available to the states, and it was this concern, to permit the states to adopt more flexible regulations than *Parker v. Brown* seemed to allow, without risk of federal preemption, which led to the adoption of the proviso to Section 2(b). Under the proviso, a state could adopt regulatory statutes under which rating bureaus could be conducted without having such rating bureaus found to run afoul of the federal anti-trust laws. In fact, Congress and most states seem to have preferred at times this type of regulation to the form of regulation which this Court sustained in *Parker v. Brown* and which North Carolina has chosen to meet its own needs. But, as this Court pointed out in *Parker v. Brown*, "*'an unexpressed purpose to nullify state control over its officers and agents is not lightly to be attributed to Congress'*, 317 U.S., at 350-351. (Emphasis added.)," quoted by the Court of Appeals in its opinion (Pet. 3a). Nor, we might add, is an unexpressed purpose to amend the accepted understanding of so basic a federal statute as the Sherman Anti-Trust Act to be lightly assumed.

Furthermore, the clear import of the language of *Parker v. Brown*, that a state cannot be subject to the Sherman Anti-Trust Act while taking affirmative action, has been consistently approved in decisions since enactment of the McCarran-Ferguson Act.[13]

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[11] See Opinion of District Court, Pet. App. 21a, 24a-25a.

[12] There is ample evidence that Congress was well aware of the doctrine of *Parker v. Brown* when it debated the enactment of the McCarran-Ferguson Act. See e.g. 91 Cong. Rec. 1479, 1480.

[13] See *North Little Rock Transportation Co. v. Casualty Reciprocal Exch.*, 85 F. Supp. 961, 964 (E.D. Ark. 1949), *aff'd*, 181 F. 2d 174 (1950), *cert. den.*, 340 U.S. 823 (1950); *Miley v. John Hancock Mutual*

CONCLUSION

Petition for certiorari should be denied.

Respectfully submitted,

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September 23, 1966

Life Ins. Co., 148 F. Supp. 299, 303 (D. Mass. 1957), *aff'd mem.* 242 F. 2d 758 (1957), *cert. den.*, 355 U.S. 828 (1957); *Insurance Co. of North America v. Insurance Commissioner of Mississippi*, 237 Miss. 759, 116 So. 2d 224, 228; *Hitchcock v. Collenburg*, 140 F. Supp. 894, 902, (D. Md. 1956), *aff'd mem.* 353 U.S. 919 (1957); *Eastern .R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-136 (1961).